Supreme Court, U.S.
FILED

06-115 JUL 2 ' 2006

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

JOSEPH L. ROBERTO, Executor of the Estate of Joseph R. Roberto,

Petitioner,

v.

MATILDE FEJERAN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

DOUGLAS F. CUSHNIE
Counsel of Record
LAW OFFICE OF
DOUGLAS F. CUSHNIE
P.O. Box 500949
Saipan, MP 96950
(670) 234-6830

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether upon the expiration of the fifteen year appeal period provided for in 48 U.S.C. § 1824(a) for appeal from decisions of the Commonwealth Supreme Court to the Ninth Circuit, that court automatically loses jurisdiction of a timely filed appeal pending in the Ninth Circuit.

PETITION FOR WRIT OF CERTIORARI

Petitioner Joseph L. Roberto, Executor of the Estate of Joseph R. Roberto, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this cause on April 25, 2006.

OPINIONS BELOW

The order of the Ninth Circuit is not for publication but is set forth in Appendix 1. The opinion of the Commonwealth Supreme Court was entered November 14, 2003 and is reported at 2003 MP 16.

STATEMENT OF JURISDICTION

The judgment sought to be reviewed was entered April 25, 2006. Jurisdiction is conferred on this court to review the judgment in question on a writ of certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

Amendment 5

No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 14, § 1

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

COMMONWEALTH CONSTITUTION

Article I, § 5

No person shall be deprived of life, liberty, or property without due process of law.

STATUTES INVOLVED

48 U.S.C. § 1823(a)

Prior to the establishment of an appellate court for the Northern Mariana Islands the district court shall have such appellate jurisdiction over the courts established by the Constitution or laws of the Northern Mariana Islands as the Constitution and laws of the Northern Mariana Islands provide, except that such Constitution and laws may not preclude the review of any judgment or order which involves the Constitution, treaties, or laws of the United States . . .

48 U.S.C. § 1823(c)

The United States Court of Appeals for the Ninth Circuit shall have jurisdiction of appeals from all final decisions of the appellate division of the district court.

48 U.S.C. §1824(a)

The relations between the courts established by the Constitution or laws of the United States and the courts of the Northern Mariana Islands with respect to appeals . . . shall be governed by the laws of the United States pertaining to the relations between the courts of the United States including the Supreme Court of the United States, and the courts of the several States in such matters and proceedings, except as otherwise provided in article IV of the covenant: Provided, That for the first fifteen years following the establishment of an appellate court of the Northern Mariana Islands the United States Court of Appeals for the judicial circuit which includes the Northern Mariana Islands shall have jurisdiction of appeals from all final decisions of the highest court of the Northern Mariana Islands from which a decision could be had in all cases involving the Constitution, treaties or laws of the United States, or any authority exercised thereunder,

unless those cases are reviewable in the District Court for the Northern Mariana Islands pursuant to section 1823 of this title.

THE CASE

A probate was established for Joseph R. Roberto (Roberto) in the Superior Court of the Commonwealth of the Northern Mariana Islands. Joseph L. Roberto, a nephew, was qualified as executor. The executor filed an extensive inventory covering personalty and realty located in the Commonwealth and the Territory of Guam. Matilde Fejeran (Fejeran), filed a claim against the estate asserting ownership of all the realty and most of the personalty. Her claims were litigated in the Superior Court resulting in a factual determination that virtually all of the personalty belonged to the estate. The Court declined to rule on the real property ownership due to an issue involving the decedent's ability to own real property in the Commonwealth in light of restrictions contained in Article XII of the Commonwealth Constitution. Fejeran appealed to the Commonwealth Supreme Court. The Supreme Court reversed the findings of the Superior Court on the personalty, and decided the issue of realty ownership, although the Superior Court had specifically declined to rule on the issue. The Supreme Court held that although the decedent could not hold fee simple absolute title to realty in the Commonwealth due to Article XII restrictions, he could pass such title to Fejeran. This disposition violated Commonwealth case law, *Manglona v. Kaipat*, 3 N.M.I. 322 (1992), the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, § 5 of the Commonwealth Constitution. See also concurring opinion of Justice Stewart in *Hughes v. Washington*, 389 U.S. 290, 295 (1967).

The executor timely appealed to the Ninth Circuit, alleging a due process violation by the Commonwealth court in taking property without notice or hearing. On May 1, 2004, the time for appeal to the Ninth Circuit

expired per 48 U.S.C. § 1824(a). The Ninth Circuit dismissed the pending appeal April 25, 2006, asserting it lost jurisdiction May 1, 2004, citing *Oden v. Northern Marianas College*, 440 F.3d 1085, 1090-91 (9th Cir. 2006).

REASON FOR GRANTING THE WRIT

The issue posed to the Ninth Circuit was whether the court's jurisdiction extended to all appeals filed before May 1, 2004, or only to appeals determined before May 1, 2004. The Ninth Circuit relied on *Oden v. Northern Marianas College*, 440 F.3d 1085, 1090-91 (9th Cir. 2006), which followed *Santos v. Guam*, 436 F.3d 1051 (9th Cir. 2006), holding jurisdiction extended only to appeals decided before May 1, 2004. The *Oden* case is currently before this Court under Docket No. 05-1545.

The purpose of the appeal provisions in 48 U.S.C. § 1824(a) permitting a fifteen year period to appeal directly into the U.S. federal system was to ensure that decisions from the new Commonwealth court system comported with American law, especially with respect to the federal Constitution and statutes. The judicial system in place prior to the creation of the Commonwealth Supreme Court provided for an appellate division within the United States District Court for the Northern Mariana Islands, to review cases emanating from the Commonwealth trial courts. 48 U.S.C. § 1823(a). Appeal was taken from the appellate division directly to the Ninth Circuit. 48 U.S.C. § 1823(c). The Ninth Circuit's assertion that it lacks jurisdiction to decide timely appeals on those issues is not in accord with the intent of Congress. It is not reasonable to believe that Congress, in light of its close attention to judicial review of cases coming out of the Commonwealth before an appellate court was established, would replace it with a system of federal appellate review that would guarantee some appeals would never be decided. This is notwithstanding that they raise issues involving U.S. Constitution, treaties and statutes.

The decisions cited in support of *Santos (supra),* relied upon in *Oden (supra),* are cases where the Congress affirmatively withdrew jurisdiction from a court. See *Bruner v. U.S.*, 343 U.S. 112 (1952); *Ex parte McCardle*, 74 U.S. 506 (1968); *Duldulao v. I.N.S.*, 90 F.3d 396 (9th Cir. 1996). There is nothing within section 1824(a) that indicates the Ninth Circuit would be divested of jurisdiction on timely filed appeals. The concept is discussed in *Get Out Oil, Inc. v. Andrus*, 447 F.Supp. 40 (C.D. Cal. 1979) citing *U.S. and Guaranty Co. v. U.S. ex rel. Struthers Wells Co.*, 209 U.S. 306 (1908) for the proposition that where such intent is not clearly indicated jurisdiction should remain. In light of the statutory history it is clear that the intent of Congress was to ensure maximum judicial review of cases coming out of the Commonwealth court system, especially those involving the Constitution, statues and treaties of the United States.

CONCLUSION

The Ninth Circuit erred in dismissing this case for lack of jurisdiction. Roberto requests that this petition be granted and Roberto's appeal be heard by the Ninth Circuit.

Respectfully submitted,

DOUGLAS F. CUSHNIE
Attorney for Petitioner
P.O. Box 500949
Saipan MP 96950
(670) 234-6830

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH L. ROBERTO, Creditor-Appellant, v. MATILDE DLG. FEJERAN; TERESA F. SAUCEDO; ANNA F. RACOMORA, Claimants-Appellees.	No. 04-72996 D.C. No. CV-01-00041-GA ORDER*

Appeal from the Supreme Court of the Commonwealth of the Northern Mariana Islands
Alejandro Castro, Associate Justice, Presiding

Submitted April 25, 2006**
Honolulu, Hawaii

(Filed Apr. 25, 2006)

Before: HAWKINS, McKEOWN, and CLIFTON, Circuit Judges.

This appeal is dismissed for lack of jurisdiction. *Oden v. Northern Marianas College*, 440 F.3d 1085, 1090-91 (9th Cir. 2006) (holding that this court lacks jurisdiction over appeals from decisions of the Supreme Court of the Commonwealth of the Northern Mariana Islands which were not completed before May 1, 2004).

APPEAL DISMISSED.

FOR PUBLICATION

APPEAL NO. 01-0041-GA

IN THE SUPREME COURT
OF THE
COMMONWEALTH OF THE
NORTHERN MARIANA ISLANDS

IN THE MATTER OF THE ESTATE OF:

JOSEPH RUFO ROBERTO
a.k.a. JOSEPH RUFU ROBERTO

Deceased,

MATILDE DLG. FEJERAN,
TERESA F. SAUCEDO,
ANNA F. RACOMORA

Claimants/Appellants,

v.

JOSEPH L. ROBERTO

Executor/Appellee.

OPINION

(Filed November 14, 2003)

Cite as: In re Estate of Roberto 2003 MP 16

Civil Case No. 98-0983

Argued and submitted on November 14, 2002

For Matilde DLG. Fejeran
Teresa F. Saucedo and
Anna F. Racomora
Claimants-Appellants:

For Joseph L. Roberto,
Executor-Appellee:

Brien Sers Nicholas, Esq.
PO Box 502876
Saipan, MP 96950

Douglas F. Cushnie, Esq.
PO Box 500949
Saipan, MP 96950

BEFORE: Alexandre C. CASTRO, Associate Justice; Juan T. LIZAMA, Justice *Pro Tempore*; and Virginia S. ONERHEIM, Justice *Pro Tempore*

LIZAMA, Justice *Pro Tempore:*

¶1 Appellants Matilde DLG. Fejeran, Teresa F. Saucedo and Anna F. Racomora appeal the trial court's "Findings of Fact and Conclusions of Law." Appellants had sought to have certain items of real and personal property excluded from the estate of Joseph Rufo Roberto (aka Joseph Rufu Roberto). We have jurisdiction pursuant to Art. IV. § 3 of the Constitution of the Commonwealth of the Northern Mariana Islands. We affirm in part, reverse in part and remand for further proceedings consistent with this opinion.

ISSUES PRESENTED AND STANDARD OF REVIEW

¶2 I. Did the trial court err in concluding that the decedent, Joseph Rufo Roberto, was not an individual of Northern Marianas descent? Because the relevant facts are undisputed, this is a pure question of law, which we review de novo. *Agulto v. Northern Marianas Investment Group, Inc.*, 4 N.M.I. 7, 9 (1993).

¶3 II. Did the trial court err in not excluding from the estate lands in the Commonwealth purchased by decedent and then placed in a trust for the benefit of Appellant Matilde Fejeran? Because the relevant facts are undisputed, this is a pure question of law, which we review de novo. *Id.*

¶4 III. Did the trial court err in not declaring that Lot 1734-New-8 should be excluded from the estate and awarded to Matilde Fejeran? Because the relevant facts are undisputed, this is a pure question of law, which we review de novo. *Id.*

¶5 IV. Did the trial court err in not declaring that Lot 1734-New-15 was the property of the "Roberto Trust" executed for the benefit of Matilde Fejeran and in not declaring that any revenue generated by lease of that lot should be property of the trust? This is a mixed question of law and fact, which we review de novo. *Id.*

¶6 V. Did the trial court err in concluding that certain accounts at Pacific Century Trust were the sole property of decedent and a part of his estate? This is a question of fact, which we will reverse only if the finding was clearly erroneous. *Camacho v. L & T Int'l Corp.*, 4 N.M.I. 323, 325 (1996).

¶7 VI. Did the trial court err in concluding that a certain Pacific Financial Corporation account was the sole property of decedent and a part of his estate? This is a question of fact, which we will reverse only if the finding was clearly erroneous. *Id.*

¶8 VII. Did the trial court err in concluding that the decedent's shares of the common stock in Chalan Kiya Industrial Center, Inc., and Chalan Kiya Apartment Circle, Inc., are part of the decedent's estate? This is a question of fact, which we will reverse only if the finding was clearly erroneous. *Id.*

FACTUAL AND PROCEDURAL BACKGROUND

¶9 The decedent, Joseph Rufo Roberto, was born in Guam on Nov. 7, 1922 and died in Saipan on July 14, 1998. He was the son of Jose Roberto and Ignacia Ada Roberto. Jose Roberto was born in Guam on Nov. 13, 1889 and died in Guam on Feb. 14, 1979. Ignacia Ada Roberto was born in Saipan on April 24, 1897 and died in Guam on March 20, 1980. Decedent's parents were married in Saipan on Dec. 25, 1921, after which they returned to Guam. They lived in Guam continuously until their deaths.

¶10 The decedent himself lived either in Guam or in the mainland United States for most of his life. He moved to Saipan in 1990 or 1991 and lived there until his death. He never married and had no children. His only sibling was a brother, Thomas John Roberto, who died in Florida, where he resided, on June 26, 1999. Thomas John Roberto was survived by his wife, Jacqueleen F. Roberto, and his three children, Joseph Lee Roberto (the executor of the estate), Michael L. Roberto, and Dolores Maria Roberto. These children are the only heirs to the decedent's estate.

¶11 Neither decedent, nor his parents, nor any of his heirs resided in Saipan at any time between 1944 and 1990.

¶12 At the time of his death, decedent left a "Last Will and Testament" dated March 5, 1985, devising all of his property to his brother, Thomas John Roberto.

¶13 From 1992 until his death, decedent shared a home with appellant Matilde DLG. Fejeran. Ms. Fejeran was decedent's first cousin. Two of her daughters, Teresa F. Saucedo and Anna F. Racomora, are also appellants herein. Ms. Fejeran and decedent had some business

dealings and also held a number of joint accounts in various banks and other financial institutions. Some of these accounts were still jointly held at the time of the decedent's death, while Ms. Fejeran's name was removed from others with her consent. These accounts are described in more detail below.

¶14 Probate of decedent's estate was instituted in 1998. On Dec. 17, 1998, the executor filed an initial inventory of the estate. On Dec. 28, 1998, Ms. Fejeran, for her own part and as attorney in fact for her daughters, filed a notice of claims and request for service of pleadings. The inventory was twice supplemented by the executor, after which Ms. Fejeran filed timely amended notices of her claims.

¶15 The property currently at issue is:

1. 23 parcels of real property located in the Commonwealth that were purchased by decedent and later placed in a trust (hereinafter the "Roberto Trust") to be managed for the benefit of Ms. Fejeran. The co-trustees were Ms. Fejeran, the decedent, and the decedent's brother Thomas Roberto. This trust was executed on July 18, 1995.

2. 1 parcel of real property, Lot 1734-New-8, located in the Commonwealth, which was removed from the Roberto Trust and placed in the name of decedent on August 19, 1997.

3. 1 parcel of real property, Lot 1734-New-15, located in the Commonwealth. This parcel was originally included in the Roberto Trust as part of larger parcel – Lot 1734-New-R2. Lot 1734-New-15 was leased to Calvary Christian Academy and an initial lease payment of $99,000 was made to decedent. Of this, $80,00 was invested with Pacific Century and

$25,000 was used to purchase Pacific Financial certificate # 3077.

4. A managed agency account and a hypothecation account at Pacific Century Trust

5. An account consisting of 10 certificates of deposit in various denominations issued by Pacific Financial Corporation.

6. 334 shares of common stock in Chalan Kiya Industrial Center, Inc., and 10,000 shares of common stock in Chalan Kiya Circle Apartments, Inc.

¶16 Of these properties, the court below declined to rule on the issue of ownership of the real property described in 1, 2 and 3 above, beyond to say that decedent could not hold a fee simple interest in it because he was not of Northern Marianas descent. However, the Court apparently did not order the land removed from the estate.

ANALYSIS

¶17 The current appeal presents the Court with a number of interesting questions of probate and property law. The Court will consider these questions in the order listed above.

I. Decedent is Not of Northern Mariana's Descent

¶18 Article XII of the Commonwealth Constitution restricts land ownership within the Commonwealth to people of "Northern Marianas descent." N.M.I. Const. art. XII § 1. A person is of Northern Marianas descent if he or she is "a citizen or national of the United States and . . . is of at least one-quarter Northern Marianas Chamorro or Northern Marianas Carolinian blood or a combination

thereof." *Id.* at § 4. To be considered full-blooded a person must have been "born or domiciled in the Northern Mariana Islands by 1950 and [must have become] a citizen of the Trust Territory of the Pacific Islands before the termination of the Trusteeship with respect to the Commonwealth" or must be descended from such persons. *Id.*

¶19 Applying this principle, the trial court correctly concluded that decedent was not an NMD. As noted in the factual outline, the decedent's father was born on Guam and lived most of his life there. There is simply no possibility that he could be considered an NMD, because he was not born in the Trust Territories and never resided there. Decedent's mother is a more difficult case because she was born and spent her childhood in Saipan. However, she moved to Guam shortly after her marriage in 1921 and permanently resided there. Therefore, we must consider whether her birth and early life alone are enough to qualify her as an NMD.

¶20 The Trust Territories Code governed citizenship in the Territories. The Code allowed, "[all] persons born in the Trust Territory" to be citizens of the territory unless "at birth or otherwise [they] have acquired another nationality." 53 T.T.C. § 1(1). Thus, decedent's mother could have been a Trust Territory citizen because of her birth in Saipan. However, she resided in Guam in 1921 until her death in 1979, likely making her a citizen of Guam. (In 1921, Guam was a possession of the United States, while the Northern Marianas were a possession of Japan). Furthermore, she became a citizen of the United States via the Guam Organic Act of 1950, as evidenced by the U.S. Passport she obtained in 1953. E.R. 177B-179. In so doing, she "acquired another nationality." Therefore, she could not be a citizen of the Trust Territory and could not

pass on such citizenship to her son. The decedent himself was born in Guam and resided either there or in the mainland U.S. until he moved to Saipan in 1990 or 1991. He could not be considered an NMD and the trial court correctly so concluded. We must consider how this finding effects the disposition of land purchased in the Commonwealth by the decedent.

II. The Trial Court Erred in not Excluding the Roberto Trust from the Estate

¶21 The Roberto Trust was executed by the decedent in July 1995 for the benefit of Matilde Fejeran. The co-trustees were the decedent, the decedent's brother Thomas Roberto, and Ms. Fejeran. The corpus of the trust was 24 parcels of land within the Commonwealth. ER. 448-460. The estate claimed these lands in its probate pleadings, but the trial court issued no ruling as to their disposition. We must consider what is to be done with these lands.

A. Executor Concedes that None of the Heirs or Devisees may own the Property in Question

¶22 In his brief, appellee contends that the fee simple interests in Commonwealth land apparently acquired by decedent, including those later transferred to the Roberto Trust, should "revert to the respective grantors." Appellee's brief at 16. This argument seems the natural result of applying appellee's contention that decedent was not a person of Northern Mariana's descent, (an "NMD"), as that term is defined in the Commonwealth Constitution art. XII § 4. Article XII limits the ownership of real property in the Commonwealth to NMDs and any acquisition of land that violates Article XII is "void ab

initio." N.M.I. Const. art. XII §§ 1 & 6. Appellee argues that, because decedent is not an NMD, we must void the original land purchases and also any trust arrangement. If the decedent has no rights in the property, he argues, then there is no property around which to form the trust and Ms. Fejeran could have no interest in those lands through the trust or otherwise. However, by arguing that the land must return to the grantors, the appellee is also conceding that neither the devisee nor the heirs can take any interest in the land. Under such circumstances, we question whether the estate has any right to contest Ms. Fejeran's claim of ownership.

B. The Executor May Not Contest Ms. Fejeran's Claims to the Roberto Trust.

¶23 In a probate action, the executor is essentially suing the entire world, seeking to dispose of all property potentially in decedent's estate and to insure that this property is correctly distributed. At a minimum, the executor must show that the decedent really did have an interest in any property claimed and that some heir or devisee may assume that interest. Instead, the executor here is attempting to the show that decedent did not have an interest in the real property in question and, in so doing is conceding that no heir or devisee can take an interest in it.

¶24 Indeed, we are baffled as to why the estate's counsel would expend time and resources arguing that this land should not be included in the estate, because the estate does not benefit from its exclusion. Because the executor's role is solely to argue for the proper inclusion and distribution of property in the estate, once it becomes clear that the estate cannot hold particular property, the

estate has no voice in deciding who does hold it. We conclude that the estate's concession is binding and prevents the estate from taking any interest in the land in the Roberto Trust. On remand the trial court shall order that all the land in the trust he excluded from the estate. However, this does not end our inquiry. We still must consider, who, if not the estate, takes title to the land. Therefore, we must decide how to treat land acquired in violation of Article XII (as the decedent did) upon the death of the acquirer.

C. A non-NMD has a Bare Right of Possession in Land Purchased in Violation of Article XII and Recovery by the Grantor is Subject to the Statute of Limitations on Article XII Claims.

¶25 At the time of a land "purchase" made in violation of Article XII, a non-NMD purchaser does not acquire ownership of the land. However, the non-NMD does acquire a bare right of possession. Hence, an NMD (other than the grantor) could not simply squat on the non-NMD's illegally-acquired land without being subject to an action for ejectment. However, this right of possession is subordinate to the grantor's right of recovery and to the government's right of confiscation, if the non-NMD is not a natural person. *See* N.M.I. Const. art. XII § 6. The executor essentially contends that the "right of recovery" in the grantor never expires. He argues that, because land sales to a non-NMD are constitutionally void ab initio, the land must be returned upon challenge to the original grantors, no matter how much time has passed since the "sale." With regard to the government, this is unquestionably

true.[1] However, individuals are bound by the Commonwealth's statute of limitations on Article XII claims.

¶26 This statute of limitations bars claims under Article XII brought more than 6 years after the plaintiff last had possession of the property. 2 CMC § 4991(a). The statute is consistent with the legislature's power to "enact enforcement laws and procedures" under Article XII § 6, and it serves the valuable purpose of assuring that all real estate transactions have some finality. After the lapse of the statutory period, the non-NMD becomes not only the only person or entity (except possibly the government) with the apparent right to possess the land, but also the sole person who could assert such a right.

¶27 We conclude that, from the time of a land purchase, a non-NMD has a right of possession superior to that of any other person or entity except the grantor and possibly the government. This right of possession becomes superior even to the rights of the grantor after the statute of limitations has run. Thus we must decide how to dispose of land purchased in violation of Article XII by a non-NMD where the grantor is barred by the statute of limitations from asserting a claim on that land. This problem is particularly thorny where, as here, the land is subsequently transferred to another entity.

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[1] The government is not bound by a statute of limitations. 2 CMC § 4991(d)(2). However, the government has as yet made no claims to the land in question here and it is by no means clear that the government could seize lands from a private person without giving compensation. The taking of such lands without compensation from a corporation is explicitly allowed. N.M.I. Coast. art. XII § 6.

D. A non-NMD with Right of Possession my [sic] Pass Good Title, Subject to Recovery by the Grantor

¶28 One possible approach to the problem of non-NMD "purchasers" is simply to grant the non-NMD purchaser what amounts to a life estate in the land, (subject to recovery by the grantor within the statutory period), and cancel all subsequent transactions at the death of the non-NMD. The land would then revert to the original grantor, whether the statute of limitations had run or not. This could be extremely problematic, of course, especially where the land in question has changed hands several times since its original purchase by the non-NMD. This interpretation would allow someone who purchased an apparent fee simple interest in land to be completely divested of that interest without any recourse for recovering the lost value. It seems clear that the statute of limitations was enacted to prevent this sort of occurrence.

¶29 Of course, such a result would be entirely avoidable if the legislature were to require that a registry of Article XII eligible individuals and corporations be kept and that each land sale transaction recorded by the Commonwealth Registrar be accompanied with a certification that the buyer was so registered. Checking on the NMD status of previous owners could then be a relatively simple part of doing due diligence. The importance of having such a registry will only grow as the amount of readily available land shrinks and the population becomes larger and more diverse. Unfortunately, no such system exists and so we must take a different approach to protect subsequent grantees.

¶30 We conclude that a non-NMD purchaser with a right of possession based on an apparent fee simple

interest, may pass good, fee-simple title to any person or entity legally capable of owning such an interest in the Commonwealth. The transaction may take any valid form, including by sale, by gift, through a will, or by operation of the laws governing intestate succession. However, passing title from a non-NMD to an NMD does not cut off the right of the original grantor to seek return of the land under Article XII, so long as the statutory period for bringing such an action has not run.

¶31 Applying these rules to the instant matter, we conclude that ownership of the land in the Roberto Trust must be awarded to Ms. Fejeran. The Roberto Trust was formed in July 1995, more than 8 years ago, so the decedent must have acquired all lands in the trust prior to that date. Therefore, none of the original grantors can challenge the acquisitions – their right to do so has expired under our 6-year statute of limitations. 2 CMC § 4991(a).[2] In addition, no individual challenged the validity of the transfer of Robert [sic] Trust land from decedent's ownership to the trust within the statutory period. The only party who might have done so, the estate, sought only to void the initial sales and only did so for the benefit of the grantors, not for its own benefit. Ms. Fejeran appears to be the only individual with even color of title to the land in the trust. Therefore, we remand to the trial court for proper orders awarding the Roberto Trust to Ms. Fejeran.[3]

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[2] The statute allows tolling only in the event of fraudulent concealment, 2 CMC 4991(b).

[3] The award of land to Ms. Fejeran is valid only as between her and the estate. This decision does not have the same legal effect as a successful quiet title action.

III. The Trial Court Erred in not Excluding Lot 1734-New-8 from the Estate

¶32 Lot 1734-New-8 was originally part of the "Roberto Trust." It was subsequently reconveyed to decedent by quitclaim deed on August 19, 1997. The trial court concluded that decedent was not an NMD and therefore could not hold a fee simple interest in this lot, but did not issue a specific ruling on whether the property was a part of the estate. As with the land still in the Roberto Trust, we conclude that the estate's concession that it has no interest in the land bars it from disputing Ms. Fejeran's claim. Had the estate instead successfully argued that decedent was an NMD, it could have taken a valuable interest Lot 1734-New-8.[4] However, we also have found alternate grounds on which Ms. Fejeran may claim this lot for the trust.

¶33 The conveyance of Lot 1734-New-8 from the Roberto Trust to decedent violated Article XII and is void. Lot 1734-New-8 was transferred out of the trust and back into decedent's name in 1997. Through this transaction, the decedent acquired an interest in land in the Commonwealth. *See* N.M.I. Const. art. XII § 2. We have established that decedent is not an NMD and so may not acquire a fee simple interest in real property in the Commonwealth. *See id* at §§ 1-3. Therefore, this transaction clearly violates Article XII and Ms. Fejeran, an interested party as both

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[4] If decedent were an NMD, he could have held a fee simple interest in Lot 1734-New-8. His heirs could then have taken that interest if they are NMD's or a leasehold if they are not. 8 CMC § 2411. Therefore, it was in the estate's interest to argue that the decedent was an NMD. Instead, the estate (properly) prevailed in their argument that decedent was not an NMD.

co-trustee and beneficiary of the trust, challenged this transaction in a timely manner when she filed a notice of claims in the instant case.[5] Therefore, the reconveyance of Lot 1734-New-8 must be voided and the lost must be excluded from the estate and returned to the Roberto Trust. We remand to the trial court for proper orders.

IV. The Trial Court Erred in not Excluding Lot 1734-New-15 from the Estate

¶34 The last piece of land we must consider is Lot 1734-New-15. According to appellant, this lot was originally included in the Roberto Trust as part of a larger parcel, Lot 1734-New-R2, and this argument is supported by the trial testimony, E.R. 667, and by our own examination of the relevant land surveys E.R. 468A-469. This evidence notwithstanding, the trial court stated that Lot 1734-New-15 was held in fee simple by decedent. However, this statement is expressed as a conclusion of law and not a finding of fact, so it is not clear whether the trial court actually considered that this lot might once have been part of the Roberto Trust. Furthermore, this finding is inconsistent with the trial court's conclusion that the decedent was not an NMD and so could not hold a fee simple interest in land in the Commonwealth.

¶35 Our examination of the record reveals that Lot 1734-New-15 was originally part of the Roberto Trust corpus

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[5] Ms. Fejeran filed a total of three notices of claims, each in response to an inventory submitted by the executor. The last of these notices was filed on June 1, 1999, well within the statute of limitations for both parcels, keeping in mind that the reconveyance of Lot 1734-New-8 did not predate the execution of the trust in July 1995.

and any finding to the contrary is clearly erroneous. If the lot is currently part of the trust it must be treated like all other land in the trust and be excluded from the estate. *See* Section II above. If the lot was part of the trust but was subsequently reconveyed, it must be treated like Lot 1734-New-8 and be excluded from the estate. *See* Section III above. Either way, Lot 1734-New-15 must be excluded from the estate and awarded to Ms. Fejeran.

¶36 In addition, we note that decedent received an initial payment of $99,000 from Calvary Christian Academy for its lease of Lot 1734-New-15. Ms. Fejeran claims that this money is rightly hers, presumably as proceeds from the trust. However, these proceeds were later rolled into other investments, primarily into accounts with Pacific Century and Pacific Financial that were held jointly by decedent and Ms. Fejeran. They no longer have a separate life and we will deal with them as we consider what is to be done with the accounts in which they were deposited.

V. The Trial Court Committed Clear Error in Finding that the Pacific Century Managed Agency Account was the Sole Property of the Decedent and Part of the Estate

¶37 One of the most hotly contested items of property in the trial court was a Managed Agency Account, originally # 14-0264-00-3, at Pacific Century Trust. (Pacific Century was then known as Hawaiian Trust Company). This account was established by decedent on December 5, 1989. On October 29, 1992, decedent requested that this account be made joint with right of survivorship. Ms. Fejeran was the other account holder. This was done and the account was apparently renumbered to 140011651.

Sometime prior to June 11, 1998, Ms. Fejeran agreed to delete her name from this account, leaving decedent as the sole account holder. The trial court determined that this account was the sole property of the decedent and a part of the estate.

¶38 The purpose of changing this account from joint- to single-holder status was clear. As Ms. Fejeran herself admits, it was done to prevent her husband, whom she was then divorcing, from being able to reach the account during the divorce proceedings. E.R. 546-547. Ms. Fejeran claims that this was meant to be a temporary arrangement, with the account being restored to joint status after the divorce was concluded. E.R. 547. Unfortunately for her, decedent passed away before this could happen. Therefore, Ms. Fejeran seeks to reclaim her interest in the account by arguing that decedent held it in trust for her.

¶39 In response, the executor claims that appellants did not argue for the creation of a trust before the trial court and should not be allowed to argue it now. Appellants seem to grant that the trust issue was not squarely raised below, but urges us to hear and decide the trust claim anyway. However, we believe we must first consider whether the steps taken by decedent and Ms. Fejeran were sufficient to break the joint tenancy. If the account remained a joint tenancy, the name change notwithstanding, then there is no need to go into trust principles. Hence, we will begin by examining the evidence presented.

¶40 As noted above, Ms. Fejeran testified that the name change was meant to be temporary and for a specific purpose. Ms. Fejeran's testimony is self-serving and would not be convincing by itself. However, this claim is supported by the testimony of Marilyn P. Magofna, the Pacific

Century Trust employee who handled the transfer of the agency account into the sole name of decedent. She testified that decedent's stated purpose for the name-change was to protect the account from Ms. Fejeran's soon-to-be ex husband. E.R. 658. She further testified that decedent said "the account will be back in joint status once the martial [sic] problems have been resolved." *Id.* In addition, we have the words of decedent himself. In a handwritten letter to Pacific Century dated June 11, 1998, decedent authorized Ms. Fejeran to obtain information on the account and to sign on his behalf, things she had always been authorized to do. E.R. 336

¶41 In responding to this argument, the executor has presented no evidence suggesting that decedent intended to permanently deprive Ms. Fejeran of her interest in this account. Instead, the executor claims that all of the proceeds used to fund the account came from the decedent and it notes that the account was solely held by decedent at the time of his death and that Ms. Fejeran surrendered her interest in the account voluntarily. As to the former, we believe that the source of the funds is irrelevant in this case. It is undisputed that decedent voluntarily added Ms. Fejeran's name to the agency account and the executor does not claim that this was induced through fraud, undue influence, or other nefarious means. Once Ms. Fejeran became a joint holder of the agency account, she had rights in that property, regardless of its origin. The latter point, the legal effect of the name change, might be more troubling, but only if we conclude that the name change was sufficient to destroy the joint tenancy.

¶42 Unfortunately for the estate, the evidence compels us to conclude that the name change did not destroy the joint tenancy. Decedent added Ms. Fejeran's

name to the account in 1992. E.R. 383. In so doing, he was specific in his request that it become a joint account. E.R. 651-652. Later, when he decided to remove Ms. Fejeran's name from the account, he was equally clear in stating that he intended her to have a continued interest in the account. E.R. 384 and 663. In other words, decedent was attempting to remove the account from Ms. Fejeran's name for the purpose of her divorce, while at the same time maintaining it as a joint account for all other purposes. We conclude that this attempt failed and the account in question remains a joint account.[6] Therefore, Ms. Fejeran's interest in it is unbroken from the time the joint tenancy was created and it remains in force. The evidence that the decedent intended to maintain a joint tenancy with right of survivorship is overwhelming and the trial court committed clear error in failing to so find. On remand, the trial court shall order that the account, or account proceeds, be returned to Ms. Fejeran, with interest as appropriate. In addition, the record reveals the existence of a hypothecation account, no. 140017153. We are unsure whether this account was ever a joint account and, if so, what its status is now. We therefore remand disposition of this account to the trial court for proceedings consistent with this opinion.

[6] The executor points to this attempt to hide assets from Ms. Fejeran's husband as an example of Ms. Fejeran's alleged dishonesty and bad faith. This may be so. However, we are not asked to decide whether Ms. Fejeran was right or wrong to do what she did. We are simply asked to determine what the legal consequences of that act are as between Ms. Fejeran and the estate.

VI. The Trial Court Committed Clear Error in Finding that the Pacific Financial Corp. Account was the Sole Property of the Decedent and Part of the Estate

¶43 In addition to the Pacific Century account, decedent and Ms. Fejeran had at one time joint ownership of master account no. 7001749 at Pacific Financial Corporation. This account consisted of a number of certificates of deposit issued by Pacific Financial. Over of [sic] the course of the joint ownership, several of these were redeemed and others were purchased to replace them. At the time of decedent's passing, there were ten certificates outstanding. As with the Pacific Century account, Ms. Fejeran was the joint holder of this account until shortly before decedent's death. However, on July 1, 1998, decedent deleted her name from the account with her permission. As with the Pacific Trust account, it appears that the purpose of this transaction was to shield these assets from Ms. Fejeran's husband during their divorce proceedings and not to create sole ownership of the account in the hands of decedent. Nonetheless, the certificates were issued to decedent and appear on their face to be his sole property. The trial court concluded that the certificates were the sole property of the decedent and awarded them to the estate.

¶44 As evidence of the intent to maintain joint ownership, we have the testimony of Jacinta Cruz, the investment clerk at Pacific Financial who handled the name change. She testified that decedent had emphasized that he still wanted Ms. Fejeran to have "full access to the account." E.R. 523. This seems entirely consistent with the decedent's treatment of the Pacific Century account. However, Ms. Fejeran has essentially conceded that the

account can no longer be considered jointly owned. Her own pleadings reflect an arrangement in which she was to be the sole owner of 4 of the certificates and decedent was to be the sole owner of the other 6. Specifically, it appears that 4 of the 10 certificates, numbers 2927, 3262, 3588, and 3590, were marked with an asterisk to indicate that they were the property of Ms. Fejeran. E.R. 42-45. If the decedent and Ms. Fejeran agreed to split the certificates, there can be no more joint tenancy and, unless the 4 certificates were held in trust for Ms. Fejeran, they must pass to the estate. Therefore, we will consider whether a trust was formed with Ms. Fejeran as beneficiary.[7]

¶45 Under our jurisprudence, the formation of a trust occurs when a settler (decedent in this case) transfers an interest in property (the 4 certificates) to a trustee (also decedent) for the benefit of an ascertainable beneficiary (Ms. Fejeran). *Lifoifoi v. Lifoifoi-Aldan;* App. No. 94-017 (N.M.I. Super. Ct. June 24, 1996) (Opinion at 12). At the time of the transfer, the settler must manifest an intent to create the trust. *Id.* In this case, the only real question is intent.[8] Decedent's insistence that Ms. Fejeran continue to have access to the accounts is clear evidence of intent to create a trust, as is the apparent agreement between decedent and Ms. Fejeran that four of the certificates would be her property. We find Ms. Fejeran's assertion of

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[7] The executor argues that we should not consider the possibility of a trust because this argument was not raised below. We recognize this, but note that we may hear the argument nonetheless if it [sic] necessary to reverse plain error or to prevent injustice. *Botalin v. Guam Publications, Inc.*, 4 NMI 176, 181 (1994). Here we believe that the trial court did err and it would be unjust not to reverse this error.

[8] The fact that decedent is both settler and trustee is not a problem. RESTATEMENT (SECOND) OF TRUSTS §17 (1959)

ownership credible in part because she could just as easily have asserted ownership of all the certificates, or of the 6 certificates that did not bear asterisks. (One of these 6, certificate # 4004, is worth $100,000 by itself. This is more than the total value of the 4 certificates that Ms. Fejeran claims).

¶46 In rebutting Ms. Fejeran's claim of ownership of the 4 certificates, the executor first argues that the funds used to purchase the certificates originated with the decedent. As we stated in our discussion of the Pacific Century account, we do not believe this is relevant because there is no dispute that the certificates were held jointly at one time. In addition, the executor points to the testimony of Alexis Fallon, a lawyer who drafted the documents necessary to create the Roberto Trust. She testified that she asked decedent at that time whether he wished to include other accounts in the trust and that he replied that everything else was taken care of. She further testified that he had stated he understood that anything not in the trust would go to his brother and his brother's children.[9] The executor suggests that this is evidence that the decedent intended his brother and his brother's children to inherit the Pacific Financial and Pacific Century accounts.

¶47 We must disagree. We note that the discussions between Ms. Fallon and decedent took place in 1995, as she prepared the documents for what would become the Roberto Trust. E.R. 468. At that time, Ms. Fejeran was already a joint-holder of the accounts at both Pacific

[9] We do not include citations here because this portion of the testimony was not made part of the excerpts of record. However, it is cited in the appellee's brief and we have do not [sic] doubt the veracity of the citations.

Century Trust and Pacific Financial. Therefore, decedent had no reason to worry that Ms. Fejeran would not receive the proceeds from those accounts should he pass away. Had he intended them to go to his brother and his brother's children, he would have had to take affirmative steps to divest Ms. Fejeran of her interest. He only did this much later and for a demonstrably different purpose. Compelled by the evidence, we must reverse the trial court and conclude that a trust was created in which decedent held Pacific Financial certificates numbered 2927, 3262, 3588, and 3590 for the benefit of Ms. Fejeran. Therefore, Ms. Fejeran is entitled to return of these certificates and/or any roll-over certificates or proceeds derived there from. However, we must affirm the trial court's holding as to the other six certificates. On remand, the trial court shall dispose of these certificates and/or proceeds there from in accordance with this opinion.

VII. The Trial Court did not Commit Error in Awarding Decedent's Shares in Chalan Kiya Industrial Center, Inc. and Chalan Kiya Circle Apartments, Inc. to the Estate

¶48 The final items at issue are shares of stock amounting to a ⅓ interest in two corporations: Chalan Kiya Industrial Center, Inc. and Chalan Kiya Circle Apartments, Inc. Ms. Fejeran alleges that decedent promised her, in December 1993, that he would give her his interest in the industrial center for herself and his interest in the apartments for two of her daughters, Teresa F. Saucedo and Anna F. Racomora. The sole evidentiary basis for this claim is Ms. Fejeran's testimony. There were no transfers of stock at the time – indeed it appears that no stock certificates had been issued. Furthermore, there is

no evidence that decedent communicated this intent to anyone else or took any affirmative steps to realize it. This contrasts sharply with decedent's efforts to create and later preserve Ms. Fejeran's interest in the real property and accounts discussed above. Finally, according to Ms. Fejeran, decedent said "When I die, my share is for you." E.R. 569. It appears, therefore, that decedent did not intend to make a present gift of his interest in these corporations, but rather a testamentary gift. This would take the form of an oral will and, as such, would not comply with Commonwealth law concerning oral wills, which requires the testimony of two disinterested witnesses, among other things. 8 CMC §2305(a)(1). (Ms. Fejeran was the sole witness and, as potential devisee, was not disinterested). We affirm the trial court's decision to award decedent's interest in Chalan Kiya Industrial Center, Inc. and Chanlan [sic] Kiya Circle Apartments Inc. to the estate.

CONCLUSION

For the foregoing reasons, the trial court's decision is **AFFIRMED IN PART** and **REVERSED IN PART** and remanded for further proceedings consistent with this opinion.

SO ORDERED THIS 14 DAY OF NOVEMBER, 2003.

/s/ Alexandro C. Castro
ALEXANDRO C. CASTRO,
ASSOCIATE JUSTICE

/s/ Juan T. Lizama
JUAN T. LIZAMA,
JUSTICE *PRO TEMPORE*

/s/ Virginia S. Onerheim
VIRGINIA S. ONERHEIM,
JUSTICE *PRO TEMPORE*

IN THE SUPERIOR COURT
OF THE
COMMONWEALTH OF THE
NORTHERN MARIANA ISLANDS

IN THE MATTER OF THE ESTATE OF JOSEPH RUFO ROBERTO Aka JOSEPH RUFU ROBERTO,	)	**CIVIL ACTION NO. 98-983D**
Deceased.	)	**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

I. INTRODUCTION

This matter came before the court for an evidentiary hearing on September 28-October 1, 1999 and December 13, 1999 on Matilde DLG. Fejeran's objection to the inclusion of certain assets in the estate of Joseph Rufo Roberto ("Decedent").[1] Joseph Lee Roberto, the estate's executor ("Executor"), was present with counsel Douglas F. Cushnie; Matilde DLG. Fejeran was present with counsel Brien Sers Nicholas, Esq.; and claimant Nieves F. Sablan was also present with counsel Michael J. Berman, Esq.[2] The court having taken the matter under advisement now renders its Findings of Fact and Conclusions of Law.

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[1] Matilde DLG. Fejeran ("Ms. Fejeran") testified that she is Decedent's first cousin and that she resided with him in Chelan Kiya from 1992 until his death.

[2] On February 4, 2000, the court entered an order dismissing Nieves F. Sablan's claims on the ground that they were untimely filed pursuant to 8CMC §2924(a)(1). The order has been appealed and is still pending.

II. FINDINGS OF FACT

a. Family

1. Joseph Rufo Roberto ("Decedent") was born on Guam on November 7, 1922.[3] He was the son of Jose Roberto and Ignacia Ada Roberto.

2. Decedent died on Saipan on July 14, 1998, at the age of 76 years. At the time of his death, he left a "Last Will and Testament" dated March 5, 1985, bequeathing his entire estate to his brother, Thomas John Roberto, who later died in 1999.[4]

3. Decedent resided on Guam and the United States mainland for most of his life until he moved to Saipan sometime in 1990 or 1991.[5]

4. His father, Jose, was born on Guam and died there on February 14, 1979.[6] Ignacia was born on Saipan on April 24, 1897 and died on Guam on March 20, 1980.[7]

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[3] Executor's Ex. No. 29 (Birth Certificate of Joseph R. Roberto). *See* also Ex. 67 (Joseph R. Roberto deposition in *Felix Calvo Torres v. Joseph R. Roberto et al.*, Civil Case No. 0889-89, Guam Superior Court).

[4] There was testimony from Ms. Fejeran about a letter she saw in Decedent's house in Piti, Guam during one of her visits in 1998. Ms. Fejeran's testimony about the contents of the letter – its testamentary nature – was not admitted into evidence. In fact, Decedent's estate planning attorney, Alexis A. Fallon, testified that sometime in 1995 she prepared a draft will, a durable power of attorney and a living will for Decedent but he refused pay for them because he did not request that they be drafted. Ms. Fallon further stated that Decedent wanted a trust agreement and was not interested in a will. Further, there was also no evidence of a codicil to Decedent's 1985 will.

[5] Testimony of Alfred Pangelinan, a business associate of Decedent.

[6] Ex. No. 36 (Copy of Jose R. Roberto's passport).

[7] Ex. Nos 38 and 38A (Ignacia A. Roberto's Certificate of Baptism and copy of passport).

5. Jose and Ignacia were married in Saipan in 1921 and moved to Guam soon after their marriage. Except for a brief visit to Saipan in 1938, the couple resided on Guam until their respective deaths.[8] In his December 1989 deposition in the *Felix Calvo Torres* case on Guam, Decedent testified that his father was "permanently residing" in Guam.[9]

6. Neither Decedent nor his parents were residents or domiciliary of the Trust Territory of the Pacific Islands at any time during the period 1945 through 1950. None were citizens of the Trust Territory of the Pacific Islands.[10]

7. Decedent was never married and had no children.[11]

8. Decedent had one sibling, Thomas John Roberto, who was born on July 8, 1924 on Guam, and died on June 26, 1999, in Florida at the age of 74 years.[12]

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[8] Ex. 42 (Mary Roberto Camacho's Affidavit dated September 13, 1999).

[9] Ex. No. 67 Roberto deposition at 24.

[10] Ex. Nos. 50, 51 and 67.

[11] Alexis A. Fallon testified that Decedent told her he did not have any children. However, there was testimony by Robert Cruz that the decedent fathered a son while living in Chicago in the late 1940's and 1950's. No name, birth certificate or other evidence was presented to substantiate Cruz' testimony. Further, the court was informed that John Richard Aflleje, a Guam resident who appeared through counsel Lecia Eason subsequent to the evidentiary hearings in this matter, has claimed heirship in the Guam ancillary probate.

[12] Ex. 28 (Certificate of Death).

9. Thomas John Roberto was survived by his widow, Jacqueleen F. Roberto and three children, Joseph Lee Roberto (the estate's executor), Michael L. Roberto, and Dolores Maria Roberto.[13]

b. Decedent's Assets

10. During his lifetime, Decedent held numerous assets consisting of cash, shares of stock in two CNMI corporations, automobiles, jewelry, and real property situated in both the Northern Mariana Islands and Guam.

11. Decedent acquired fee simple interests in real property in the Northern Marianas in the 1990's.

12. On July 18, 1995, Decedent executed the Roberto Trust with a specific provision that the trustees transfer Decedent's interests in 24 parcels situated in the Northern Marianas to Ms. Fejeran, the sole beneficiary.[14] One parcel, Lot 1734-New-8 situated in Chalan Kiya, was reconveyed by the trustees to Decedent pursuant to an August 8, 1997 Quitclaim Deed.

13. On August 19, 1997, Decedent leased Lot 1734 NEW-15 to Calvary Christian Academy for a period of 55 years, with rent to be paid in installments, Decedent

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[13] Ex. 47 (Roberto Family Chart).

[14] Ex. HH (Roberto Trust, together with Exhibit A listing 24 parcels of property). The Executor indicated that certain parcels (Lot 1734 NEW 4 R/W, 1734 NEW R/W, 1734 NEW-6-1R/W, 1743-NEW-6-2R/W and 1734 NEW-5R/W) might have been conveyed by Decedent to the Division of Public Lands as roadway easements. However, Ramon S. Salas of the Division of Public Lands testified that no deeds or agreement over the easements were executed. Further, he stated that no compensation was ever made to Decedent for the easement.

invested $80,000 of the initial rental payments with Pacific Century Trust.[15]

14. Decedent also held real property interests in Talofofo (Bubulao area) and Piti, Guam, which are the subject of an ancillary probate proceeding in the Guam Superior Court.

15. Sometime in 1988, Decedent engaged in real estate transactions including the sale of a portion of the Bubulao property.

16. On December 5, 1989, from the Bubulao sales proceeds, Decedent established a managed agency account at the Hawaiian Trust Company in Honolulu, Hawaii under account number 14-0264-00-3.[16]

17. In 1988, Decedent transferred $1,003,000.00 to account no. 00346-01303 at the Bank of America in Watsonville, California of which $999,958.50 was used to purchase a U.S. Treasury Bill on October 28, 1988.[17] On September 30, 1992, monies held from the Treasury Bill were transferred to the Bank of Hawaii, Hawaiian Trust Company in the amount of $999,995.00.[18]

18. During his lifetime, Decedent jointly held assets in the Northern Marianas and California with Ms. Fejeran, of which only two were in existence at the time of Decedent's death: Bank of Hawaii savings account no.

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[15] Exs. 52, 53, 54 and 55.

[16] Exs. 64 (Letter from Pacific Century) and 65 (Hawaiian Trust statements).

[17] Ex. JJ (Bank of America Statements)

[18] Ms. Fejeran's testimony on September 30, 1998.

6079-059244 and checking account no. 32-240151.[19] Ms. Fejeran testified that she delivered the balance of the savings account to Executor shortly after Decedent's funeral.[20] Ms. Fejeran later closed both bank accounts.

19. Decedent and Ms. Fejeran further owned a Nissan Kingcab.[21] In its November 24, 2000 Order, the court authorized the Executor to sell the automobile and deposit the proceeds in Executor's account.

20. Decedent purchased items of jewelry from jewelry stores on Guam between 1988 and 1992 as evidenced by various receipts.[22] One significant item was an

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[19] The other jointly held assets, sold or closed during Decedent's lifetime, included:

a. A house located at 11800 Foxwood Lane in Salinas, California, purchased in 1989 and sold in April 1998.

b. Trust accounts with Pacific Century under account nos. 140011651 and 140017153 ("Pacific Century accounts").

c. An investment account with Pacific Financial Corporation, Saipan Branch ("PFC") under corporate account no. 700149.

d. Bank of Hawaii Savings account no. 6032-131518.

e. Bank of America, North Salinas Branch, California checking account no. 05267-09765.

f. Bank of America, Watsonville Branch, California Savings account no. 0034-7-09325.

[20] A portion of the account was used to pay Decedent's funeral expenses.

[21] Another automobile, Nissan Pathfinder, was mentioned during the hearing, but the title to the automobile rests with Ms. Fejeran and her daughter, Lupe Fejeran.

[22] *See* Surinder S. Nagi's Deposition of June 23, 1999 and attached receipts. Some of the items purchased by Decedent include: an opal ring in 14 karat setting; one aquamarine ring with diamonds in 14 White gold; one 18-karat gold pinky ring; one gold ring with diamond; one diamond earring in 14 karat gold; one 4-baht chain and one 24-karat

(Continued on following page)

Alexandrite men's ring purchased by Decedent for $82,495.[23] At his deposition, Surinder S. Nagi, owner of O'rama jewelry store, testified that Decedent wanted the Alexandrite ring for himself.[24]

21. Ms. Fejeran testified that, except for the three men's Rolex watches[25] and three mens's rings given to Pedro Torres, Aaron Larson, and Frederico Guerrero, the jewelry she has in her possession were given to her by Decedent.

22. Decedent owned 334 shares of common stock in Chalan Kiya Industrial Center, Inc., a Northern Marianas corporation, engaged in the warehouse rental business. The other two stockholders are Alfred Pangelinan and Ms. Fejeran. Ms. Fejeran testified that Decedent said his 334 shares in Chalan Kiya Industrial Center would be transferred to her.

23. Decedent also owned 10,000 shares of common stock in Chalan Kiya Apartment Circle, Inc., a Northern Marianas corporation, engaged in the apartment rental business. Ms. Fejeran testified that Decedent intended to transfer his 10,000 shares in Chalan Kiya Circle Apartments to Ms. Fejeran's daughters, Teresa F. Saucedo and Anna F. Racomora.

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pendant; one black pearl earring; one diamond ring and one star sapphire ring in 18 karat gold settings.

[23] The Alexandrite ring was paid in two installments: $20,200 on June 6, 1991, and the balance of $62,295.95 on August 27, 1991. See attachments to Nagi deposition.

[24] *See* Nagi deposition at 19.

[25] One watch was given to Decedent's brother, Thomas, and the remaining two are in Executor's possession.

24. No stock transfers or assignments were executed by Decedent with respect to the two corporations.

25. On July 1, 1998, two weeks prior to his death, Decedent caused the name of Ms. Fejeran, with her agreement, to be deleted from the joint accounts at Pacific Financial Corporation resulting in Decedent being issued corporate notes in his sole name.[26]

26. Prior to June 11, 1998, Decedent caused Ms. Fejeran's name to be deleted from the managed agency accounts at Pacific Century Trust.

27. Alexis A. Fallon told Decedent that if he dies without a will, the person who could inherit in the event of intestacy would be his brother and his children. Ms. Fallon testified that Decedent was "well aware that his brother would be the one that would be entitled to inherit."

III. CONCLUSIONS OF LAW

1. NMI Const. art. XII, § 4 establishes the test to determine whether a person is of Northern Marianas descent ("NMD"):

> A person of Northern Marianas descent is a person who is a citizen or national of the United States and who is of at least one-quarter Northern Marianas Chamorro or Northern Marianas Carolinian blood or a combination thereof. . . . For purposes of determining Northern Marianas descent, a person shall be considered to be a full-blooded Northern Marianas Chamorro or Northern Marianas Carolinian if that person was born

[26] Ex. I (Matilde A. Fejeran Letter of July 1, 1998).

> or domiciled in the Northern Marianas by 1950 and was a citizen of the Trust Territory of the Pacific Islands before the termination of the Trusteeship with respect to the Commonwealth.[27]

The operative language of Section 4 is that an individual must be born or domiciled in the Northern Marianas by 1950 and be a Trust Territory citizen.[28] Neither Decedent nor his parents satisfy the expressed requirements of Section 4. Decedent was born on Guam and lived there until late 1949, when he moved to Chicago, Illinois. He then returned to and resided on Guam until late 1989, when he moved to Saipan. Decedent was naturalized as a U.S. citizen on March 1, 1949 in Chicago. Decedent's father was born on Guam, while his mother Ignacia, although born on Saipan, moved to Guam shortly after her marriage in 1921 and permanently resided there.

2. Decedent was not an individual of Northern Marianas descent and thus pursuant to Article XII of the Commonwealth Constitution was not eligible to hold fee

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[27] In *Boddy v. Leon Guerrero*, Civ. Nos. 93-0245 (N.M.I. Super. Ct. Nov. 17, 1993) (Decision and Order on Cross-Motions for Summary Judgment), the court stated that it was clear that the Framers made a distinction between Chamorros living in the Northern Marianas and those from Guam. It pointed to a passage from *Wilmer, Cutler and Pickering, Briefing Paper No. 8: Eligibility to Vote and Election Procedures (1976)*: "Chamorros living on Guam, and Carolinians living on Truk, presumably could not be considered as being of Northern Marianas descent. *Id.* at 4.

[28] In *Boddy*, the court held that "the Trust Territory designation employed by the Department of State beginning in 1947 was designed to describe people inhabiting the Trust Territory, not people whose parents were born there but who have lived elsewhere since before the First World War." *Id.* at 5. Here, Ignacia resided on Guam way before the "Trust Territory designation."

simple interest in real property within the Commonwealth.[29]

3. Lot 1734-New-8 situated in Chelan Kiya, Saipan was reconveyed by the co-trustees to Decedent pursuant to the August 8, 1997 Quitclaim Deed.

4. The Pacific Century Trust Joseph R. Roberto managed agency account, which was funded and under the sole name of Decedent at the time of his death, was his sole property and is thus a part of his estate.

5. The Pacific Financial Corporation accounts, which were funded and in the sole name of Decedent at the time of his death, were the sole property of Decedent and thus are a part of Decedent's estate. Although Ms. Fejeran argues that the funds pass to her as the surviving tenant because the funds were previously held in a joint bank account under her name and the decedent's, there is insufficient evidence that Decedent intended to treat Ms. Fejeran as a joint tenant after the joint account was closed.

6. Decedent leased to Calvary Christian Academy a parcel of Chelan Kiya, Saipan property described as Lot

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[29] At this time, the court will not venture into the specific transactions involving the parcels of properly described in Ex. HH (Roberto Trust). However, it is clear from the Roberto Trust and testimonies by Ms. Fallon and Ms. Fejeran that Decedent intended to convey all his interest in and title to the parcels (including the five roadway easements described above) to Ms. Fejeran. The court recognizes that its holding that Decedent is not of Northern Marianas descent may invite further litigation over the parcels.

1734 NEW-15, which before this instant court decision he held in fee simple.[30]

7. Like other forms of joint ownership of property by a donor under which the survivor becomes the sole owner of the jointly-held property, a joint bank account is generally considered an *inter vivos* donative document of transfer and therefore operates to avoid probate as full ownership passes to the survivor. *See* RESTATEMENT (SECOND) OF PROPERTY, DON.TRANS., § 32.4 cmt. d (1990)[31] Accordingly, Bank of Hawaii savings account nos. 6079-059244 and checking account no. 32-240151 are the property of the surviving joint account holder, Matilde A. Fejeran. Executor shall promptly return all amounts from the accounts delivered to him by Ms. Fejeran.

8. Absent stock transfer documents to Ms. Fejeran and her daughters, Decedent's shares of common stock in both Chalan Kiya industrial center, Inc. and Chalon Kiya Circle Apartments, Inc. are part of Decedent's estate.[32]

9. This court does not have jurisdiction to adjudicate any dispute as to title to involving the Piti and Bubulao, Guam real property, as they are subject to the ancillary probate proceeding in Guam Superior Court Probate No. PR0135-98.

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[30] As indicated in footnote 29, the court will not venture into the precise interest that the estate has *vis a vis* Calvary Christian Academy and Decedent's predecessor/grantor of the subject parcel.

[31] In the absence of customary or statutory law, the court applies the Restatements of Law pursuant to 7 CMC § 3401. *See Ito v. Macro Energy, Inc.* 4 N.M.I. 46, 55 (1993).

[32] Ms. Fejeran's testimony, standing alone, does not sufficiently convince this court that the shares should be transferred to her or her daughters.

10. All jewelry items, except the Alexandrite men's ring, purchased by Decedent and currently in the possession of Ms. Fejeran are the property of Matilde A. Fejeran.

11. Ms. Fejeran shall have title to the Nissan Pathfinder. The proceeds from the sale of the Nissan Kingcab shall be a part of the estate.

SO ORDERED this 31st day of October, 2001.

/s/ John A. Manglona
JOHN A. MANGLONA
JUDGE *PRO TEM*

(2)

Supreme Court, U.S.
FILED
AUG 24 2006
OFFICE OF THE CLERK

No. 06-115

IN THE

Supreme Court of the United States

JOSEPH L. ROBERTO,
Executor of the Estate of Joseph R. Roberto,

Petitioner,

v.

MATILDE DLG FEJERAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

BRIEN SERS NICHOLAS
LAW OFFICE OF:
BRIEN SERS NICHOLAS
Post Office Box 502876
Saipan, MP 96950
(670) 235-7190

Counsel for Respondent

203079

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

The question presented by the petitioner is based on the premise that (1) the appeal to the Ninth Circuit was timely filed and (2) that the appeal raised issues involving the United States Constitution, treaties and statutes and therefore the Ninth Circuit had jurisdiction over the appeal from the Commonwealth Supreme Court.

For the following reasons, the appeal to the Ninth Circuit was not timely filed and did not involve issues of the United States Constitution, treaties and statutes.

PROCEDURAL HISTORY RELEVANT TO JURISDICTION

On November 14, 2003, the Commonwealth Supreme Court issued its Opinion. Petition for Certiorari, App. 2.

On November 28, 2003, the Executor/Appellant filed a Motion to Extend Time to File Petition for Rehearing.

On December 4, 2003, the Commonwealth Supreme Court granted an extension of time to file Petition for Rehearing.

On December 12, 2003, the Executor/Appellant filed his Petition for Rehearing in the Commonwealth Supreme Court.

On April 27, 2004, the Executor/Appellant filed a Motion to Dismiss Petition [for Rehearing] in the Commonwealth Supreme Court.

On April 30, 2004, the Executor/Appellant filed the Notice of Appeal to the Ninth Circuit from the November 14, 2003, Opinion of the Commonwealth Supreme Court.

On May 12, 2004, the Commonwealth Supreme Court denied the Executor/Appellant's Petition for Rehearing.

THE NOTICE OF APPEAL WAS NOT TIMELY FILED

The notice of appeal to the Ninth Circuit was filed on April 30, 2004, more than 30 days after the November 14, 2003, opinion from which the appeal was taken. Therefore, the notice of appeal was not timely filed in accordance with Rule 4(a)(1)

of the Federal Rules of Appellate Procedure. *See also*, Circuit Rule 6-1(a)(ii).

Circuit Rule 6-1(b)(i) provides the following:

> If a timely petition for rehearing under Rule 40 of the Rules of Appellate Procedure of the CNMI Supreme Court is filed in the CNMI Supreme Court, the time for appeal to this court shall run from the entry of the order denying the petition.
>
> A notice of appeal filed after announcement or entry of the judgment but before disposition of a petition for rehearing is ineffective to appeal from the judgment or order, or part thereof, specified in the notice of appeal, until the date of the entry of the order disposing of the petition for rehearing.
>
> Appellate review of an order disposing of the petition for rehearing requires the party to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment shall file an amended notice of appeal within the time prescribed by FRAP 4(a)(1), 4(a)(3), and 4(a)(5), measured from the date of entry of the order disposing of the petition for rehearing....

Circuit Rule 6-1(b)(i)(paragraphing added).

The Executor/Appellant filed a timely petition for rehearing in the Commonwealth Supreme Court.

The Executor/Appellant filed a notice of appeal to the Ninth Circuit on April 30, 2004, i.e., after the November 14, 2003, judgment and before the May 12, 2004, disposition of the petition for rehearing.

Therefore, the April 30, 2004, notice of appeal to the Ninth Circuit was ineffective to appeal from the November 14, 2003, judgment specified in the notice of appeal, until the date of the

entry of the order disposing of the petition for rehearing, i.e., until May 12, 2004.

However, on May 12, 2004, the United States Court of Appeals no longer had jurisdiction over appeals from the Commonwealth Supreme Court. COVENANT TO ESTABLISH A COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS IN POLITICAL UNION WITH THE UNITED STATES OF AMERICA, Art. IV, Section 403(a). The appellate jurisdiction of this court to review CNMI Supreme Court judgments ran "for fifteen years from the establishment of the CNMI Supreme Court. 48 U.S.C. 1801 (Commonwealth Covenant, art. IV, Section 403(a)." *Santos v. Nansay Micronesia, Inc.*, 76 F.3d 299, 301 (1996). The Commonwealth Supreme Court, the appellate court of the Northern Mariana Islands, was established May 2, 1989. Therefore, effective May 2, 2004, the Ninth Circuit no longer had appellate jurisdiction over decisions of the Commonwealth Supreme Court.

Thus, the United States Court of Appeals for the Ninth Circuit has no jurisdiction over this appeal.

FEDERAL QUESTIONS WERE NOT RAISED OR DECIDED BY THE COMMONWEALTH SUPREME COURT IN ITS NOVEMBER 14, 2003, DECISION

Furthermore, federal questions were neither raised nor decided by the Commonwealth Supreme Court in its November 14, 2003, decision. *See, Estate of Dela Cruz*, 279 F.3d 1098 (9th Cir. 2002); *Milne v. Hillblom*, 165 F.3d 733 (9th Cir. 1999); *Castro v. Hotel Nikko Saipan, Inc.*, 96 F.3d 1259 (9th Cir. 1996); *Santos v. Nansay Micronesia, Inc.*, 76 F.3d 299 (9th Cir. 1996).

The Ninth Circuit has no jurisdiction to review the decisions of the Commonwealth Supreme Court on Commonwealth law. *See, Santos v. Nansay Micronesia, Inc.*, 76 F.3d 299 (9th Cir. 1996); *Castro v. Hotel Nikko Saipan, Inc.*, 96 F.3d 1259 (9th Cir. 1996); *Diamond Hotel Co., Ltd. v. Matsunaga*, 99 F.3d 296 (9th Cir. 1996).

In the *Diamond Hotel* case, the Ninth Circuit refused to review the Commonwealth Supreme Court decision because "the primary issue in this case involves an interpretation of Article XII of the Commonwealth Constitution." *Diamond Hotel Co., Ltd. v. Matsunaga*, 99 F.3d 296, 298 (9th Cir. 1996).

The Ninth Circuit has held that Article XII of the Commonwealth Constitution is not federal law. *See, Yokeno v. Mafnas*, 973 F.2d 803, 805-809 (9th Cir. 1992); *Sablan v. Manglona*, 938 F.2d 970 (9th Cir. 1991).

The decision of the Commonwealth Supreme Court in this case "simply does not involve the Constitution, the treaties, or the law of the United States in the manner required for [this court] to exercise appellate jurisdiction." *See, Commonwealth of the Northern Mariana Islands v. Campbell*, 42 F.3d 546, 550 (9th Cir. 1994).

Although the Executor raised issues of due process in his Petition for Rehearing in the Commonwealth Supreme Court, the Executor did not appeal the Denial of Petition for Rehearing, dated May 12, 2004. *See also*, Circuit Rule 6-1(b)(i).

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

BRIEN SERS NICHOLAS
LAW OFFICE OF:
BRIEN SERS NICHOLAS
Post Office Box 502876
Saipan, MP 96950
(670) 235-7190

Counsel for Respondent